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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1023

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and ROBERT L. BRADDOCK, VIRGINIA A. GRIFFIN, HENRY C. KASSON, CHARLES D. LINDBERG, and MARY T. SCHLOSS, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and DONALD R. WALDRIP, INDIVIDUALLY AND AS SUPERINTENDENDENT OF THE CINCINNATI PUBLIC SCHOOLS,

Petitioners,

v.

MONA BRONSON by her parent and next friend CHARLES BRONSON, TONY FLETCHER by parent and next friend MRS. PARILEE FLETCHER, GLENN ALEXANDER by parent and next friend MRS. HARVENA ALEXANDER, NINA SHAPIRO by parents and next friend MR. & MRS. JUDITH & HERBERT SHAPIRO, CHAUNSTON BROWN by parent and next friend MRS. LUKKIUCIUS BROWN, MARK GERARD SILLETT by parent and next friend MRS. ANASTASIA SILLETT, PARRISH LATTIMORE by parents and next friend MR. & MRS. DONALD LATTIMORE, JR., ROBIN FRYE by parent and next friend BETTY J. FRYE, VALERIE MILLER by parents and next friend MR. & MRS. CHARLES MILLER, ANDRE HARRIS by parent and next friend MRS. JANET HARRIS, DAVID FRIEL by parents and next friend MR. & MRS. KENT FRIEL, MICHAEL SEXTON by parent and next friend STEPHEN R. SEXTON; and on behalf of all persons similarly situated; ROBERT S BROWN and RONALD J. TEMPLE, individually and as members of the BOARD OF EDUCATION of the City School District of the City of Cincinnati,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 13

APPENDICES

A. Opinions of the United States Court of Appeals for the Sixth Circuit 1a

B. Opinion of the United States Court of Appeals for the Sixth Circuit 34a

C. Opinion and Order on Motion to Determine Affirmative Defense of Res Judicata, United States District Court for the Southern District of Ohio, Western Division 36a

D. Order of the United States Court of Appeals for the Sixth Circuit 59a

E. Memorandum and Subsidiary Findings of Fact, *Deal, et al.* v. *Cincinnati Board of Education, et al.*, United States District Court for the Southern District of Ohio, Western Division (Filed September 30, 1968) 61a

F. Order of the United States Court of Appeals for the Sixth Circuit 74a

CASES CITED

Ashe v. *Swenson*, 397 U.S. 436 (1970) 8

Baldwin v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931) 8, 9

Blonder-Tongue Labs. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 8

PAGE

Chicago Life Ins. Co. v. *Cherry*, 244 U.S. 25 (1917) . 8

Deal v. *Cincinnati Board of Education*, 244 F. Supp. 572 (S.D. Ohio 1965), aff'd 369 F.2d 55 (6th Cir. 1966), *cert. den.*, 389 U.S. 847 (1967), aff'd on other issues, 419 F.2d 1387 (6th Cir. 1969), *cert. den.*, 402 U.S. 962 (1971) 2, 3

Hansberry v. *Lee*, 311 U.S. 32 (1940) 11

Heiser v. *Woodruff*, 327 U.S. 726 (1946) 8

Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 (1955) 8

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) . 12

Smith v. *Swormstedt*, 16 How. (U.S.) 288 (1853) .. 12

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921) 12

System Federation No. 91, Ry. Employes' Dept., A.F.L. v. *Reed*, 180 F.2d 991 (6th Cir. 1950) ... 12

Tcherepnin v. *Knight*, 389 U.S. 332 (1967) 12

Tidewater Oil Co. v. *United States*, 409 U.S. 151 (1972) 12

Western Union Telegraph Co. v. *Commonwealth of Pennsylvania*, 368 U.S. 71 (1961) 10

UNITED STATES CONSTITUTION CITED

U.S. CONST. amend. XIV 2, 7

U.S. CONST. amend. V 10

STATUTES CITED

28 USC § 1292(b) 4, 12

OTHER AUTHORITIES CITED

Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723 (1968) 7

PAGE

Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Mich. L. Rev. 33 (1963) 10

Steakley and Howell, *Ruminations on Res Judicata*, 28 Sw. L. J. 355 (1974) 10

Black, *A Treatise on the Law of Judgments*, Vol. II, § 500 (2d ed. 1902) 10

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BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and ROBERT L. BRADDOCK, VIRGINIA A. GRIFFIN, HENRY C. KASSON, CHARLES D. LINDBERG, and MARY T. SCHLOSS, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and DONALD R. WALDRIP, INDIVIDUALLY AND AS SUPERINTENDENDENT OF THE CINCINNATI PUBLIC SCHOOLS,

Petitioners,

v.

MONA BRONSON by her parent and next friend CHARLES BRONSON, TONY FLETCHER by parent and next friend MRS. PARILEE FLETCHER, GLENN ALEXANDER by parent and next friend MRS. HARVENA ALEXANDER, NINA SHAPIRO by parents and next friend MR. & MRS. JUDITH & HERBERT SHAPIRO, CHAUNSTON BROWN by parent and next friend MRS. LUEKIUCIUS BROWN, MARK GERARD SILLETT by parent and next friend MRS. ANASTASIA SILLETT, PARRISH LATTIMORE by parents and next friend MR. & MRS. DONALD LATTIMORE, JR., ROBIN FRYE by parent and next friend BETTY J. FRYE, VALERIE MILLER by parents and next friend MR. & MRS. CHARLES MILLER, ANDRE HARRIS by parent and next friend MRS. JANET HARRIS, DAVID FRIEL by parents and next friend MR. & MRS. KENT FRIEL, MICHAEL SEXTON by parent and next friend STEPHEN R. SEXTON; and on behalf of all persons similarly situated; ROBERT S BROWN and RONALD J. TEMPLE, Individually and as members of the BOARD OF EDUCATION of the City School District of the City of Cincinnati,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 24, 1975 which affirmed as modified and interpreted an opinion and order of the United States District Court for the Southern District of Ohio, Western Division, entered January 30, 1975.

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OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. The opinion of the district court is unreported. Both opinions are reproduced in the Appendix at pages 1a and 36a, respectively.[1]

JURISDICTION

The opinion of the court of appeals was entered September 24, 1975. A Petition for Rehearing filed by petitioners was denied October 30, 1975. Jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Was the district court correct in holding that the principles of collateral estoppel pronounced by this Court and the several circuit courts of appeal have the same force and effect in school desegregation actions asserting Fourteenth Amendment rights which such principles have generally *or* was the court of appeals correct in holding that a judgment in favor of the board of education in a desegregation case does not have the same binding effect which judgments in other types of cases are given?

STATEMENT OF THE CASE

Petitioners ask this Court to exercise certiorari jurisdiction to pass upon the correctness of the judgment of the Court of Appeals for the Sixth Circuit which affirms "as modified and interpreted" an order of the United States District Court for the Southern District of Ohio. The district court held that petitioners have properly asserted that respondents are bound by the judgment and findings made by the district court in *Deal, et al.* v. *Cincinnati Board of*

[1] The opinion of the court of appeals which granted permission to appeal from an interlocutory order is reported in 512 F.2d 718 (6th Cir. 1975) (App. 34a).

Education, et al., 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd* 369 F.2d 55 (6th Cir. 1966), *cert. den.*, 389 U.S. 847 (1967), *aff'd on other issues*, 419 F.2d 1387 (6th Cir. 1969), *cert. den.*, 402 U.S. 962 (1971). It is the court of appeals' modification and interpretation of the district court's opinion and order, by a two to one decision,[2] that petitioners ask this Court to review.

This is the second desegregation suit against the Cincinnati Board of Education within a span of eleven years. It was preceded by a virtually identical action filed in 1963 on behalf of the same class of plaintiffs in which essentially the same allegations were made and the same relief was demanded. That suit resulted in a judgment in favor of the Cincinnati Board of Education. (244 F. Supp. 572) The court of appeals affirmed that judgment, but remanded the case "for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer." (369 F. 2d at 65) On remand, the district court found "that neither gerrymandering nor any other alleged discriminatory practice on the part of the Board brought about such racial imbalance as existed. . . ." (419 F.2d at 1398) That general finding was supported by eighteen detailed findings in favor of the Board on specific issues of claimed constitutional violations. (419 F.2d at 1398-1401) All of the findings on remand were affirmed by the court of appeals. (419 F.2d 1387)

Based on the findings made in the *Deal* case, petitioners asserted in this case, as a partial defense, that the plaintiff class, being the same as the class in *Deal*, was bound by the *Deal* findings, and could not endeavor to undermine or

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[2] The dissenting judge would have affirmed the district court without any modification. (App. 15a).

impeach those findings in the course of this litigation. The district court agreed with petitioners, and ruled that respondents "will be prohibited from relitigating [the] factual determinations" made in *Deal* as of July 26, 1965. (App. 55a) [3]

The district court stated in its order that the collateral estoppel issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal [pursuant to 28 USC § 1292(b)] from the order may materially advance the ultimate termination of the litigation." (App. 58a) Accordingly, respondents petitioned for permission to appeal from the district court's order. The court of appeals agreed that the collateral estoppel issue presented a controlling question of law, and granted permission to appeal. (512 F.2d 718) (App. 34a)

The district court's opinion carefully defines the application of the collateral estoppel defense to this case:

> It remains only to define the consequences of the collateral estoppel defense as it applies to the case at hand. Basically, our decision that collateral estoppel is applicable herein means that the parties must accept Judge Peck's findings of fact, and that the parties will be prohibited from relitigating those factual determinations. We refer not only to the general finding rendered in *Deal* I (that racial imbalance in the Cincinnati Public Schools was not intentionally caused by the Board of Education), but also to the specific subsidiary findings of *Deal* II which we believe were actually litigated and necessarily determined in order to resolve the question of "whether discrimination existed with respect to specific schools and programs"

[3] In order that the importance of the issue presented by this petition be properly assessed, we have reproduced in the Appendix in their entirety the specific findings made by the district court in the *Deal* case. (App. 61a) The findings appear as an appendix to the court of appeals' second affirmance of the district court. (419 F.2d at 1398-1401)

> (369 F. 2d at 65), and in order to resolve the larger overriding question of whether black pupils in the Cincinnati Public Schools were being denied equal protection of the law in contravention of the Fourteenth Amendment. (App. 55a)

This statement is consistent with the principles of collateral estoppel which have emanated from this Court and the several circuit courts of appeal.

Although the court of appeals "affirmed" the district court, its affirmance was "as modified and interpreted." (App. 12a) The court of appeals' modification of the district court's order is as follows:

> If new evidence of pre-*Deal* occurrences or conditions is offered the district court will determine in each instance whether or not such evidence is relevant to the inquiry in the present case, i.e., does it shed light on the claim that minority pupils and their parents have been denied equal protection of the law by the defendants during the post-July 26, 1965 period involved in this action? As we have noted previously, in discussing developments and refinements since *Deal*, the district court referred to "the cumulative evidence of a possible constitutional violation." Ultimate decision of the present case will necessarily require consideration of cumulative evidence. Adherence to the doctrine of issue preclusion in no way forecloses the consideration of such evidence. (App. 12a)

The opinion of the Chief Judge Phillips, which is designated as concurring, suggests a further modification of the district court's opinion:

> To the extent that newly discovered evidence of pre-1965 occurrences is relevant in assessing the constitutionality of defendants' conduct after July 26, 1965, it may be admitted for that purpose. A more difficult question would be presented if the new evidence suggested that the findings in *Deal* were incorrect.

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> School children born or starting to school after the decision in *Deal* II are entitled to have introduced on their behalf in the present case relevant evidence as to matters occurring prior to July 26, 1965, regardless of whether that evidence contradicts the *Deal* findings. If new evidence of pre-1965 events, substantially undercutting the *Deal* findings, is introduced on behalf of school children born or starting to school after the decision in *Deal* II, the District Court may receive it and should consider whether some or all of those findings continue to be viable.
>
> Thus it is apparent that collateral estoppel has only a limited effect in this case. Plaintiffs have wide latitude in marshalling evidence in support of their claim for relief. They are precluded only from relying on the evidence presented in *Deal* to support findings different from or inconsistent with those actually made in that case. (App. 14a)

Fairly considered, the court of appeals' modification of the district court's order represents a novel and special qualification of the doctrine of collateral estoppel for school desegregation cases. If such qualification should gain the force of general precedent, boards of education could be kept in perpetual litigation.

REASONS FOR GRANTING THE WRIT

As far as we know, this is the first school desegregation case to reach this Court in which the NAACP is renewing old claims previously litigated against the same board of education. The district court which will hear this case, and the district courts which will hear other desegregation cases in which the defense of collateral estoppel will be raised, need to know whether to apply the rules of collateral estoppel as this Court has defined them or to apply those rules as the Sixth Circuit has rewritten them for school desegregation cases.

We believe that the Sixth Circuit's unsupportable modification of the district court's ruling was occasioned by the tacit and erroneous assumption that there is something about Fourteenth Amendment rights asserted in school desegregation cases which must cause courts to turn away from the imperatives of the doctrine of collateral estoppel.[4] If permitted to stand uncorrected, such judicial policy could have widespread and disastrous consequences. We urge this Court to grant certiorari in order to prevent such consequences.

The appeal in this case was taken for the purpose of resolving "a controlling question of law" necessary for the expeditious termination of this school desegregation case. Yet a careful reading of the opinions of the three judges who comprised the panel demonstrates that each of them resolved that question in a different way. All of them agree that petitioners may assert the defense of collateral estoppel based on the *Deal* findings. Judge Lively's opinion, which is designated the opinion of the court, modifies the application of that doctrine as it applies to this case by allowing proof of pre-*Deal* facts for the purpose of "[shedding] light on the claim that minority pupils and their parents have been denied equal protection of the law by [petitioners] during the post-July 26, 1965 period. . . ." (App. 12) Chief Judge Phillips, in an opinion denominated

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[4] As traditionally applied, the doctrine of *res judicata* operates to bar the entire claim while the companion doctrine of collateral estoppel operates to bar the relitigation of specific fact issues that have been adjudicated in a prior proceeding. The term "*res judicata*," however, is often used in its generic sense to encompass both doctrines. See Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723 (1968). We wish to emphasize that petitioners claim only that respondents are collaterally estopped from relitigating the findings in the *Deal* case or presenting evidence of pre-*Deal* facts to support their present claims. In other words, any claims of post-*Deal* violations should be limited to those which would be supported by post-*Deal* facts.

as concurring, states without citation of authority that the district court may receive evidence of pre-*Deal* facts even if such evidence impeaches the *Deal* findings. (App. 14a) Judge Weick, who dissented, would affirm the district court and require that respondents prove their claims on the basis of post-*Deal* facts. (App. 15a) It is apparent, therefore, that the interlocutory appeal failed to achieve its intended purpose. Unless this Court grants certiorari and resolves the issue definitively, the district court must attempt to reconcile the three opinions of the court of appeals to determine precisely in what way its opinion was modified and by whom.

We submit that, but for the fact that this is a school desegregation case, the court of appeals would have had no difficulty applying a judicial doctrine as deeply rooted in American jurisprudence as is that of collateral estoppel. That the court of appeals had great difficulty with this question is plainly apparent from its call for supplemental briefs after the oral argument on the question:

> Should the doctrine of res judicata be held inapplicable in this school desegregation case on grounds of overriding public policy? (App. 74a)

But school desegregation cases should be subject to the doctrines of *res judicata* and collateral estoppel to the same extent as cases involving other areas of substantive law. This Court has repeatedly emphasized that these doctrines are preeminent. *E.g.*, *Blonder-Tongue Labs.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955); *Heiser* v. *Woodruff*, 327 U.S. 726 (1946); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917). Indeed, we can perceive of

no more explicit instructions on the importance of these doctrines than those imparted in Chief Justice Stone's opinion in *Heiser* v. *Woodruff*:

> But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, *which is founded upon the generally recognized public policy that there must be some end to litigation* and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. *Baldwin* v. *Iowa State Traveling Men's Asso.*, 283 U.S. 522, 525, 526, 75 L ed 1244, 1246, 1247, 51 S Ct 517.
>
> . . .
>
> In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit. (327 U.S. at 733-35) (Emphasis added)

We submit that the public policy of terminating litigation has unique application to desegregation actions, which have demonstrably disruptive effects upon communities.

Justice Stewart's statement in *Ashe* v. *Swenson* is as emphatic as the expression quoted above:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States* v. *Oppenheimer*, 242 U.S. 85, 61 L Ed 161, 37 S Ct 68, . . . (397 U.S. at 443)

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While *Ashe* is a criminal case, it demonstrates that the doctrine of collateral estoppel has an important constitutional dimension. That case involved successive state criminal prosecutions of the defendant for robbery of a poker game. The first trial resulted in an acquittal of the charge of robbing one of the poker players. The defendant was then brought to trial on a second charge for robbing one of the other players. After the court overruled a motion to dismiss on the ground of double jeopardy, the defendant was tried and convicted. On certiorari, this Court held that the second trial was barred by the doctrine of collateral estoppel which, it was further held, is embodied in the Fifth Amendment:

> The ultimate question to be determined . . . is whether [the doctrine of collateral estoppel] is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. (397 U.S. at 445)

In view of the holding in *Ashe*, we suggest that in civil cases the doctrine of collateral estoppel has its roots in Fifth Amendment Due Process.[5] If this is so, petitioners' entitlement to the full benefits of the *Deal* findings rises to the dignity of a constitutional right.

Whether, as *Ashe* implies, the right to rely upon the collateral effect of a prior judgment is entitled to constitutional protection, there is no doubt that it is entitled to the full protection of judicial policy. In the *Blonder-Tongue Labs.* case Mr. Justice White expressed the overriding

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[5] *Cf. Western Union Telegraph Co.* v. *Commonwealth of Pennsylvania*, 368 U.S. 71 (1961), in which the Court held that an escheat judgment violated due process because the Pennsylvania courts had no power to protect the defendant against claims of other states that the funds were subject to recovery under their escheat statutes. See generally Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Mich. L. Rev. 33, 47 (1963); Steakley and Howell, *Ruminations on Res Judicata*, 28 Sw. L. J. 355 (1974); Black, *A Treatise on the Law of Judgments*, Vol. II, § 500 (2nd Ed. 1902).

consideration behind that policy when he referred to the need to avoid a "misallocation of resources" and the diversion of defendant's time and money "to relitigation of a decided issue." (402 U.S. at 329) The holding of *Blonder-Tongue Labs.* is that unless a party against whom estoppel is asserted can demonstrate "that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time,' " the defense of collateral estoppel must be upheld. (402 U.S. at 333)

The ultimate issue of fact in the *Deal* case, as in the present case, was whether the evidence shows a segregative intent on the part of the Cincinnati Board of Education. No serious argument can be made that the plaintiffs in the *Deal* case did not fully and fairly litigate, "procedurally, substantively and evidentially" that factual issue as of July 26, 1965. As the court of appeals stated in its second affirmance:

> [Plaintiffs'] representatives spent about two and one-half years pouring over the books and records of the Cincinnati School System in an effort to find something that was wrong. . . . In lengthy briefs appellants complain about almost everything in the operation of the Cincinnati School System. (419 F.2d at 1394-95)

Moreover, the court of appeals' recognition that the class in this case was fully and adequately represented in *Deal* (App. 9-10a) highlights the error in Chief Judge Phillips' observation that children new to the school system since *Deal* have the right to offer evidence to undercut the findings of *Deal.* (App. 14a) It is established beyond dispute that if the class is the same as that in the prior case and if the class was fairly represented in that prior case, all members of the class, then existing and subsequent, are bound by the judgment in that case. *E.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben Hur* v.

Cauble, 255 U.S. 356 (1921); *Smith* v. *Swormstedt*, 16 How. (U.S.) 288 (1853); *System Federation No. 91, Ry. Employes' Dept., A.F.L.* v. *Reed*, 180 F.2d 991 (6th Cir. 1950) Indeed, if that were not the law, every new elector could relitigate reapportionment cases and every new taxpayer could relitigate taxpayers actions. The system, itself, could not stand the strain of such perpetually unsettled conditions.

Bearing in mind that this is an interlocutory appeal under Title 28 USC § 1292(b), we urge the Court to grant certiorari for the same reason as in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970): "[to review] this basic issue . . . at this stage of the litigation [and not postpone such review] until after a trial under the Court of Appeals' decision." (396 U.S. at 381) See also *Tcherepnin* v. *Knight*, 389 U.S. 332, 334 (1967). Indeed, the statement by Mr. Justice Stewart in *Tidewater Oil Co.* v. *United States*, 409 U.S. 151 (1972) expresses the compelling reason why certiorari should be granted here:

> Whenever a court of appeals decides a controlling question of law in any litigation, its views are subject to review here. Far from being anomalous, interlocutory review of potentially dispositive questions by the courts of appeals in Government antitrust cases would be helpful to this Court, giving us the benefit of intermediate appellate consideration in these cases. We could then exercise our certiorari power informed by the reasoning of an appellate court, and there might be no later direct appeal at all from the final judgment. And surely interlocutory appeals under § 1292 (b) in Government antitrust cases would serve to lighten the burden on trial courts and litigants alike. (409 U.S. at 186-7)

It is significant that, in commencing this appeal, respondents maintained that the collateral estoppel effect of

the *Deal* findings presents a controlling question of law. If this question is reviewed now, and this Court rules, as we believe it must, that the court of appeals' modification of the district court's opinion was erroneous, then an enormous potential waste of litigation time and money will be obviated, not only for the parties and the district court in this case, but for the parties to other school desegregation cases, and for the judges who must decide them.

CONCLUSION

This classic interlocutory appeal presents a controlling novel question of enormous public interest. It is uniquely within the reach of this Court's certiorari jurisdiction. We respectfully urge that the writ for which these petitioners pray be issued.

Respectfully submitted,

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